Supreme Court of the United States

October Term, A. D. 1952

No. 322

CARL B. BALDOT, RAYMOND P. SHERIER, JOSEPH J. GERBER,
Petitioners,

vs.

OHIO TURNPIKE COMMISSION AND ARCHIBALD J. ALLEN, SECRETARY-TREASURER OF THE OHIO TURNPIKE COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND BRIEF IN SUPPORT THEREOF

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IN THE

Supreme Court of the United States

October Term, A. D. 1952

No. 323

CARL R. BALDUF, RAYMOND P. GREENE, JOANNE J. GREENE,
Petitioners,

vs.

OHIO TURNPIKE COMMISSION AND ARCHIBALD J. ALLEN,
SECRETARY-TREASURER OF THE OHIO TURNPIKE COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND BRIEF IN SUPPORT THEREOF

To the Honorable the Supreme Court of the United States:

Carl R. Balduf, Raymond P. Greene and Joanne J. Greene, by Arthur M. Sebastian, and Robert C. Ragan their attorneys in this cause, respectfully petition this Honorable Court:

1. To review the judgment of the Supreme Court of Ohio in the above cause wherein said court overruled a motion of the petitioners to intervene and become parties defendant in the case of The State of Ohio ex rel Ohio Turnpike Commission, Relator, vs. Archibald J. Allen, Secy-Treas. of Ohio Turnpike Commission, Respondent, being case number 33129 on the docket of said Supreme Court of Ohio, which order was made and entered upon the journal of said Court on June 10, 1952.

2. For the Writ of Certiorari to the Supreme Court of Ohio for that purpose.

In this behalf, Petitioners show:

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

On March 11, 1952, petitioner Carl R. Balduf filed an action in the Court of Common Pleas of Lucas County, Ohio, being case number 175811 on the docket of said court (R. 183), in which the Ohio Turnpike Commission was named defendant and wherein said defendant, the Ohio Turnpike Commission and the members thereof consented to the jurisdiction of said court and filed their answer therein (R. 207). At the time of the filing of the mandamus action this case had been set in the Court of Common Pleas of Lucas County, Ohio, on May 19, 1952 for trial on July 21, 1952 (R. 246). Although the record does not disclose the fact, this case was subsequently put over for trial until the Fall Term 1952.

Plaintiff Raymond P. Greene and Joanne J. Greene filed their action in the Court of Common Pleas of Lucas County, Ohio, on May 28, 1952 (R. 223), naming said Ohio Turnpike Commission and its respective members as parties defendant and service of summons has been duly had in said cause of action which is now pending on the docket of said Court of Common Pleas being case number 176131 and the respondents in this action, defendants in the Common Pleas action, have not to date taken exception to the jurisdiction of said Court of Common Pleas.

Both the Balduf and Greene actions above described, charge the respondents in this action with abuse of discretion on various grounds and raise constitutional questions under both the Constitution of the State of Ohio and the Constitution of the United States, all of which are now pending before said Court of Common Pleas for

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trial on their merits. On June 3, 1952, respondent Ohio Turnpike Commission passed a resolution (R. 20) in which they determined the necessity of constructing what is known as Ohio Turnpike Project No. 1 and of issuing $326 million State of Ohio Turnpike revenue bonds to cover the proposed construction cost of said Project No. 1 and authorizing the execution of a trust agreement (R. 42) to secure said bonds. On June 4, 1952, respondent commission accepted an offer from a financial syndicate (R. 39) to buy said bonds and the trust agreement above referred to was approved by respondent commission, and its members excepting Archibald J. Allen, Secy-Treas. of respondent commission. Mr. Allen refused to affix the seal of said respondent commission to said trust agreement and to attest the same as required by law and the direction of the resolution of said relator commission (R. 19).

Within a matter of hours on June 4, 1952, said commission by and through its counsel, filed a petition (R. 13) for Writ of Mandamus in the Supreme Court of the State of Ohio directed against the said Archibald J. Allen as Secy-Treas. of the Ohio Turnpike Commission. Almost simultaneously the printed answer of said Archibald J. Allen respondent was filed in said Court (R. 133) and at the same time, a demurrer to his answer and printed briefs both in support of and in opposition to said demurrer were filed (R. 173), docketed by said court as Case No. 33129 on the docket of said Court. This matter was set for oral argument for June 10, 1952 before the Supreme Court of the State of Ohio, all without notice to petitioners.

The petitioners herein, acting with the utmost diligence within the limited time available to them and under the necessity of learning and acquainting themselves with the issues raised by the foregoing pleadings, prepared and filed their motion to intervene in said Supreme Court action on Monday, June 9, 1952 (R. 183). Petitioners also

prepared and tendered to the Clerk of the Supreme Court of the State of Ohio on the morning of June 10, 1952, their duly verified answers in said proceedings wherein said petitioners asserted that they were necessary and proper parties in said mandamus action under the law of the State of Ohio, which said answers were placed in the hands of the Clerk of Supreme Court of the State of Ohio for filing and upon the date of the filing of this petition remain in the office of said Clerk of Court. Copy of said answer is submitted herein as Appendix A, for the information of this court. On the morning of June 10, 1952, petitioners, through their counsel, were advised by Carl V. Weygandt C. J. of the Ohio Supreme Court, that their motion to intervene would be considered by the court prior to oral arguments which was scheduled for 9 o'clock A. M. The members of said court were observed to enter the conference room at approximately 8:56 o'clock A. M., and at 9 o'clock A. M., said court was convened and the matter of oral argument in the above described mandamus action was the first order of business on the calendar of the court for that day. At the opening of the said session, it was announced by Carl V. Weygandt, C. J., that the motion of these petitioners to intervene had been overruled (R. 2) and that petitioners would be permitted to file a brief *amicus curiae* in the matter (R. 2). The overruling of said motion was duly journalized on the same date in said mandamus proceedings.

Thereafter on June 12, 1952, these petitioners filed a motion for re-consideration of the decision of the court in which their original motion to intervene was overruled (R. 2) and this motion was denied on July 9, 1952 (R. 2). The Supreme Court handed down its decision (R. 4) on the same day, sustaining the demurrer and allowing the writ of mandamus.

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II.

JURISDICTIONAL STATEMENT

This court's jurisdiction is invoked under Title 28 U.S. Code, Jurisdiction and Venue, Section 1257(3).

The judgment to be reviewed is a final judgment as to the petitioners herein by the highest court of the State of Ohio in which a decision could be had.

The judgment is a decision, final as to these petitioners, in which the Supreme Court of Ohio overruled (R. 2) a motion of these petitioners to intervene in the mandamus proceedings described above. (R. 183) The motion of these petitioners was timely and would not have delayed the proceedings in the Ohio Supreme Court or in any way interfered with the deliberations of the Court in that said motion did not inject new or foreign issues in the mandamus proceedings. The petitioners herein are left wholly without other adequate means of asserting their rights and are without right of appeal from the order or judgment in such proceedings by reason of not being parties thereto. The motion to intervene, and all documents in support thereof are included in the transcript of the record of the Ohio Supreme Court filed herein.

The petitioners were prepared and stood ready on the morning of June 10th, 1952, prior to the hearing of the Ohio Supreme Court of arguments in said mandamus proceedings, to file their answer therein and said answer, Appendix A herein, was tendered to the Clerk of the Ohio Supreme Court.

The General Code of the State of Ohio, Section 11255, provides as follows:

> "Any person may be made a defendant who has or claims an interest in the controversy adverse to

the plaintiffs, or who is a necessary party to a complete determination or settlement of a question involved therein."

Section 11262 provides:

"The Court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights. *When such determination cannot be had without the presence of other parties, the Court may order them to be brought in, or dismiss the action without prejudice.*" (Emphasis added.)

Section 11263 provides:

"In an action for the recovery of real or personal property, a person claiming an interest in the property, on his application, may be made a party."

39 O. Jr. p. 796, Sec. 67 states:

"Clearly, one who has an interest in property in litigation, which is affected or may be impaired by the judgment, may intervene in the action. Moreover, by the express terms of the Code, one claiming an interest in real or personal property, the recovery of which is being sought by action, may on his application be made a party thereof, * * * "

The law of Ohio is well settled that the petitioners were entitled to have their motion to intervene granted as a matter of right. *Rosenberg vs. Mehl,* 37 O. App. 95; *Pritz vs. Messer,* 112 O. S. 628.

The City of Maumee is likewise a necessary party and it is the contention of these petitioners that as a unit of government, the City of Maumee should have been made party to the mandamus proceedings by the court on its own order.

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The 14th Amendment to the Constitution of the United States provides as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of said citizens of the United States; nor shall any state deprive any person of life, liberty, or property without *due process of law* (emphasis added) or deny to its persons within its jurisdiction the equal protection of its law."

The decision of the Supreme Court of the State of Ohio here in question (R. 4) deprives these petitioners of due process in that they were entitled to their day in court in the mandamus proceedings and have no other means to assert their rights therein.

III.

QUESTIONS PRESENTED

The sole and only question raised by this petition is the question of the right of the petitioners to be made parties in the mandamus proceedings before the Supreme Court of the State of Ohio and file their answer therein and to assert their interests in such proceedings. As stated above, in the Jurisdictional Statement, the law of Ohio is well settled as to the right of these petitioners to their day in court in the mandamus proceedings and establishes also that the City of Maumee is a necessary party in the mandamus action. It would appear clear that the mere fact of prior pending litigation in the Court of Common Pleas of Lucas County, Ohio, would give this right to the parties and, therefore, the only question is as follows: "Did the Supreme Court of the State of Ohio deprive these petitioners of their constitutional rights by overruling the motion filed in the mandamus action before said Court?"

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

PROPOSITION 1.
RIGHT OF PETITIONERS TO INTERVENE

The petitioners were deprived of their property without due process of law when the Supreme Court of Ohio overruled the motion of the petitioners to intervene in the mandamus proceeding entitled "The State, ex rel. Ohio Turnpike Commission vs. Allen, Secretary-Treasurer (R. 2)" wherein said Supreme Court of Ohio, on July 9, 1952, allowed a writ of mandamus (R. 3) to require the secretary-treasurer of such Ohio Turnpike Commission to seal and attest certain revenue bonds and a trust agreement securing them.

Under the law of the State of Ohio, the petitioners, namely, Carl R. Balduf, Raymond P. Greene, and Joanne J. Greene, were and are entitled to intervene as parties defendant in the mandamus proceeding. Their right so to intervene is to be found in Sections 11255 and 11262 of the Ohio General Code, namely,

> Section 11255. "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of a question involved therein."
>
> Section 11262. "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights. When such determination cannot be had without the presence of other parties, the court may order them to be brought in, or dismiss the action without prejudice."

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A. HISTORY OF THE TWO PRECEDING SECTIONS

Both Sections 11255 and 11262 of the Ohio General Code were in substance parts of the original code of Civil Procedure enacted by the Ohio Legislature on March 11, 1853 and effective on July 1, 1853 (51 Ohio Laws, 57-166).

Section 11255, Ohio General Code, is based upon Section 35 of such original Code of Civil Procedure, namely,

> Section 35. "Any person may be made a defendant, who has or claims an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." (51 Ohio Laws 62).

Section 11262, Ohio General Code is based upon Section 40 of such original Code of Civil Procedure, namely,

> Section 40. "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court *must* order them to be brought in" (Italics not in original statute but supplied for emphasis). (51 Ohio Laws 63.)

When the entire body of Ohio Statutory law was revised during or near the year 1878, Section 35 of the original Code of Civil Procedure was repeated, in slightly different but essentially similar phraseology, as Section 14 of Chapter 3 of Division 2 of Title I of a statute enacted on May 14, 1878 (75 Ohio Laws, 597 to 835, at page 607). Section 40 of the original Code of Civil Procedure was repeated but in a slightly different

form, as Section 21 of Chapter 3 of Division 2 of Title I of the same statute of May 14, 1878 (75 Ohio Laws, 608), namely,

> Section 21. "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving rights; but when a determination of the controversy cannot be had without the presence of other parties, the court *may order them to be brought in, or dismiss the action without prejudice.*" (Italics not in original statute but added for emphasis.)

The aforesaid Section 14 of Chapter 3 of Division 2 of Title I of the Act of May 14, 1878, later became Section 5006 of the Revised Statutes of Ohio and still later became Section 11255 of the Ohio General Code. The aforesaid Section 21 of the same Chapter 3, etc. later became Section 5013 of the Revised Statutes of Ohio and still later became Section 11262 of the Ohio General Code.

Neither of the sections previously mentioned are peculiar to Ohio but are to be found in many of the states which employ the system of so-called "Code pleading" modeled upon the original New York Code of Civil Procedure. Pomeroy on "Code Remedies" (4th edition, 1929) contains a list of States which have a statute similar to Section 11255 of the Ohio General Code on page 87, in note 11; and of those which have a statute similar to Section 11262 on page 91, note 18.

The modern Section 11255 of the Ohio General Code is substantially the same as it was in its earlier versions, since the omission of some of the original commas and the splitting of one long sentence into two shorter ones does not alter its meaning.

The modern Section 11262 of the Ohio General Code

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has been altered from its original form in two ways, namely,

1. By the substitution of the word "may" for the original word "must" in the final clause of the section; and

2. By the addition of the words, "or dismiss the action without prejudice" at the end of the section.

A search of the cases and of available material pertaining to the revision of May 14, 1878 (75 Ohio Laws 597 *et seq*) fails to throw any light upon the reason for the change in Section 11262, Ohio General Code, or upon what it was meant to accomplish. The change appears for the first time and without explanation in the revision of May 14, 1878. (Before such change had been made the Ohio Supreme Court had discussed Sections 35 and 40 of the original Code of Civil Procedure in *Penn. vs. Hayward*, 1863, 14 Ohio State, 302. On page 306, the court said,

> "It will be perceived that the language in both these sections is merely *permissive*, with the exception, relating to cases where a determination of the controversy cannot be had without prejudice to the rights of others, and there, it is *mandatory* upon the court."
>
> "The effect of these Sections is to vest in the court a *legal discretion* to say, when and under what circumstances a suit may proceed without drawing into its vortex all parties interested in the questions involved in it, if it can be done without prejudice to the rights of others. But this discretion is not an arbitrary discretion. It must be exercised with due regard to established rules; and prominent among these, is the duty to avoid *multiplicity of suits*, and to attain a final and complete determination of all the questions involved in it, with the least delay and at the least possible expense."

When the legislature on May 14, 1878, substituted the word "may" for the word "must" in Section 40 of the original Code of Civil Procedure of 1853, this alone would not have changed the meaning of such original Section 40 according to two well-established Ohio rules of statutory construction.

The first of such two rules of Ohio statutory construction is that a change in the wording of a statute, made in a general revision such as that of May 14, 1878, will be strongly presumed not to change its meaning but that the meaning of the original statute will attach to its revised and slightly altered form unless it is clearly the intent of the legislature to change the meaning. The Ohio Supreme Court and various inferior courts have reiterated this principle many times. Page's Ohio Digest, Life-time Edition, under the topic "Statutes" at Section 170, lists 53 cases in support of this proposition. A typical one is *State ex rel. H. P. Clough & Co. vs. Commissioners of Shelby County,* 1881, 36 O. S. 326, wherein, on page 330, the Court said,

> "The court is only warranted in holding the construction of a statute which has undergone revision to be changed, when the intent of the legislature to make such change is clear, or the language used in the new act plainly requires such change of construction to be made."
>
> "Neither an alteration in phraseology nor the omission or addition of words in the latter statute necessarily require a change of construction . . . The intent to give the new act a different effect from the old, should be clearly manifested."

Examination of the records of the Ohio Legislature for the year 1878, fails to disclose any record of intent by the Judiciary Committees of either House or of the composite Legislature to effect any such change in wording or meaning.

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Examples of changes in phraseology at time of revision which did not change original meaning of statute are *State vs. Stout*, 1892, 49 O. S. 270, 30 N. E. 437 (original word "murder" changed to "kill") and *German American Insurance Company vs. McBee*, 1911, 85 O. S. 161, 97 N. E. 722 (original word "of" changed to "or").

The second of such two rules of Ohio statutory construction is that the word "may" when used in a statute means "must" in all cases where the public is interested or where a matter of public policy, and not merely of private right, is involved. *Swazey vs. Blackman*, 1837, 8 Ohio 5; *Columbus, Springfield and Cincinnati R. Co. vs. Mowatt*, 1880, 35 O. S. 284; *Stanton vs. Frankel Brothers Realty Co.*, 1927 117, O. S. 345, 158 N. E. 868.

However, the legislature in its revision of May 14, 1878, (75 Ohio Laws, 597 *et seq.*) did more than merely substitute the word "may" for the word "must" in the Section 40 of original Code of Civil Procedure (51 Ohio Laws, 63). It also added a new clause at the end of the section, namely,

"or dismiss the action without prejudice"

These additional words modify the entire sentence of which they are the concluding part. They clearly indicate that in this instance, at least, the legislature did intend that the meaning of the statute should be changed. They rebut the presumption that a change in the wording of statute made in a revision or codification of the same does not change the meaning of the original statute.

The addition of such words, namely,

"or dismiss the action without prejudice"

gives the court an alternative which previously it lacked. Under Section 40 of the original Code of Civil Procedure (51 Ohio Laws 63), the court, when confronted with a controversy whose determination could not be had without the presence of other parties, was obliged to order

such other parties to be brought in. As was clearly pointed out in *Penn. vs. Hayward*, 1863, 14 O. S. 302, on page 306, the court had no choice in such a situation but was bound by a *mandatory* provision of the statute. The words added in the 1878 Revision,

"or dismiss the action without prejudice"

enlarged such original narrow field of judicial authority by authorizing the court to do one of two things, namely,

1. To order such other parties to be brought in; or
2. To dismiss the action without prejudice.

But they also required the court to do one thing or the other. If the court ordered such other parties to be brought in, it did not have to dismiss the action. If the court dismissed the action without prejudice, it did not have to order such other parties to be brought in.

Even after the authority of the court was so enlarged under the 1878 Revision by the additional words,

"or dismiss the action without prejudice,"

the court was not authorized to do what the Ohio Supreme Court did in the present case, namely,

Not to order such other parties (namely, the petitioners for this writ of certiorari) to be brought in; and

Not to dismiss the action without prejudice; but

To proceed with a determination of the controversy in the mandamus proceedings in the absence of such other parties although such determination could not be done without prejudice to the rights of such other parties.

B. The Petitioners, Carl R. Balduf, Raymond P. Greene, and Joanne J. Greene were entitled to intervene in the Mandamus Proceeding.

In the succeeding pages, whenever the words "Mandamus Proceeding" are used, they refer to the action en-

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titled, *The State of Ohio ex rel. Ohio Turnpike Commission, Relator, vs. Archibald J. Allen, Secretary-Treasurer of Ohio Turnpike Commission, Respondent,* being case number 33129 on the docket of the Supreme Court of Ohio (R. 13).

Whenever the words "The Petitioners" are used, they refer to Carl R. Balduf, Raymond P. Greene, and Joanne J. Greene, who, in the present proceeding are petitioning the Supreme Court of the United States for a writ of certiorari to the Supreme Court of Ohio; and whenever the words "The Commission" are used, they refer to the Ohio Turnpike Commission.

The petitioners are entitled under Section 11255 of the Ohio General Code to be made defendants in the Mandamus Proceeding, since

1. They both have and claim an interest in the controversy in the Mandamus Proceeding adverse to the plaintiff therein; and

2. They are necessary parties to a complete determination or settlement of a question involved in such Mandamus Proceeding.

Each of such petitioners is a taxpayer within Lucas County, Ohio, as set forth in the original action filed by Carl R. Balduf on March 11, 1952, in the Court of Common Pleas of Lucas County, against The Ohio Turnpike Commission and others, being case number 175811 on the docket of said court (R. 183). Raymond P. Greene and Joanne J. Greene, husband and wife, filed their original action also in the Court of Common Pleas of Lucas County, Ohio, against the same defendants being case number 176131 on the docket of said court on May 28, 1952. Both actions allege that plaintiffs are resident taxpayers in the State of Ohio, County of Lucas and City of Maumee and that prior demand for the bringing of such suits was made on the duly appointed and acting City Solicitor of the City of Maumee before commencement of the actions and

pursuant to the requirements of the laws of the State of Ohio, and that in both cases said demands were rejected in writing and the actions brought as property owners and taxpayers on behalf of the plaintiffs and all other persons similarly situated and similarly interested therein (R. 184, 223).

Each of such petitioners has a substantial property interest which will be affected by the construction of the Ohio Turnpike. The Commission has not yet clearly marked the outer boundaries of the Turnpike right-of-way in Lucas County, Ohio, but has publicly announced both in the daily press and at a meeting of such Commission held in the Maumee High School Auditorium, in Maumee, Lucas County, Ohio, August 24, 1951, that the Turnpike would cross the Maumee River on a line parallel with, and within a few hundred feet southeast of the bridge of the Toledo Terminal Railroad. The petitioner, Carl R. Balduf, has a dower interest in a lot containing the dwelling house wherein he lives, which is either going to be traversed by the right-of-way of the Turnpike or which will be less than one hundred feet from the southerly boundary of such right-of-way.

The petitioners, Raymond P. Greene and Joanne J. Greene are husband and wife and live in and own a private residence property located at 2850 River Road, Maumee, Ohio Turnpike No. 1.

Even though the property of such petitioners may not be directly in the path of the Turnpike right-of-way so as to entitle them to compensation when their property is taken from them, nevertheless they will suffer a substantial property loss. It is a matter of common knowledge, of which this Court is asked to take judicial knowledge, that the presence of a toll highway like the contemplated Ohio Turnpike lessens the value of adjacent real estate for residential purposes. The property of such petitioners is so near such Turnpike right-of-way, that it will be in-

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juriously effected thereby. The noise, fumes and vibration of the thousands of trucks and smaller vehicles which will use the Turnpike at all hours of the day or night will destroy much of the market value of such adjacent property which now is being used for high-class residential purposes.

The damage mentioned in the preceding paragraph is consequential and hence the State of Ohio need not compensate the property owners who suffer it. But it is damage none the less. It is "*damnum absque injuria.*" (*Richards vs. Washington Terminal Company,* 1914, 233 U. S. 546, 34 S. Ct. 654, 58 L. Ed. 1088, LRA 1915 A 887.)

But merely because such situation is "*absque injuria*" does not lessen the "*damnum.*" The absence of any legal remedy for the harm in dollars and cents which such a Turnpike does to property within its immediate vicinity does not mean that the harm does not exist. And because such harm does exist and because the persons namely, the Petitioners, who suffer such harm are unable to obtain compensation for it in the courts, the reason was all the greater for allowing them to participate in the Mandamus Proceeding.

Section 11255 of the Ohio General Code uses the words,

> "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of a question involved therein."

The Petitioners filed actions in the Lucas County, Ohio, Court of Common Pleas (R. 183, 223) against the Turnpike Commission and others, in which were directly presented several of the questions arising under the Constitution of Ohio which the Supreme Court of Ohio decided in the Mandamus Proceeding (R. 4). Such action in the Lucas County Court of Common Pleas also pre-

sented questions arising under the Constitution of the United States (R. 187 *et seq.*, R. 228 *et seq.*), but the Supreme Court of Ohio did not mention such questions in its opinion in the Mandamus Proceeding (R. 4). As a result of the refusal of the Supreme Court of Ohio to allow the Petitioners to intervene as defendants in the Mandamus Proceeding, such Petitioners now find themselves in the position of litigants whose case has been decided in their absence. The questions under the Ohio Constitution upon which they rely are the same questions which have been decided by the Ohio Supreme Court adversely to them and in their absence. In other words, the Supreme Court of Ohio could not decide the issues in the Mandamus Proceeding without also deciding the legal problems raised in the action against the Commission in the Lucas County Court of Common Pleas. If any such action in the Lucas County Court of Common Pleas is ever reviewed by the Supreme Court of Ohio, the doctrine of *stare decisis* will confront the parties with a determination of their case although they had no chance to be heard in their own behalf.

The Petitioners contend that for the reasons given in the preceding paragraph, they should have been allowed to intervene as parties defendant, under Section 11255 of the Ohio General Code, since they not merely had and claimed an interest in the controversy adverse to the plaintiff but they also were necessary parties to a complete determination or settlement of questions raised therein. The Petitioners submit that they are unable to find authorities, whether in Ohio or elsewhere, directly in point on this matter and, therefore, it must be concluded that this is a case of initial impression before this or any court. In every mandamus case the petitioners have examined, the relator has made every person who had any possible interest or right in the action a party to the action.

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PROPOSITION 2.

THE PETITIONERS HAVE A RIGHT TO INTERVENE IN THE MANDAMUS PROCEEDING UNDER SECTION 11262 OF THE OHIO GENERAL CODE

The evolution of Section 11262 of the Ohio General Code from its original form in the Code of Civil Procedure of 1853 to the present time, has been discussed earlier in this brief. In its present form, it reads as follows:

> "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights. When such determination cannot be had without the presence of other parties, the court may order them to be brought in, or dismiss the action without prejudice."

This brief has shown on page 14 that the final sentence of Section 11262 requires the court either to order such other parties to be brought in, or dismiss the action without prejudice. While Sections 11255 and 11262 are in *pari materia* and therefore should be construed together, obviously Section 11262 is not a mere repetition of Section 11255. Section 11262 introduces a legal concept which is absent from Section 11255, namely, that of a person who has rights of such a nature that he will suffer prejudice to them unless he is allowed to participate in the controversy.

Section 11262 means something more than the "interest" mentioned in Section 11255, else Section 11262 becomes merely tantological. When the courts have spoken of such "interest," under Section 11255, they have frequently stated that it means a property interest. But the right of a party to intervene under Section 11262 ought not to be so limited. In *Dodd vs. Reese,* 1940, 216 Ind. 449, 24 N. E. (2d) 995, 128 ALR 574, the Indiana Supreme Court had before it an Indiana statute similar to Section

11262. The Court construed the statute so as to permit a lawyer to intervene in a collateral suit in which he was being accused in the pleadings of misconduct. Such collateral suit was being brought to set aside an adoption which the lawyer had procured. On page 456 and 457, the Indiana Supreme Court, after quoting the statute, said:

> "It has been repeatedly held that the right to intervene is not limited to actions for the recovery of real or personal property. But the word "interest" seems generally to have been considered as referring to some property interest; perhaps because the cases in which the intervention has been sought involve property rights. . . . That a good reputation for honesty and uprightness, and fair dealing, is a valuable thing has never been doubted, and actions may be maintained for injury to good reputation, and recovery may be had independent of any proof of financial loss by reason of the injury, but to destroy the reputation of a practicing lawyer is undoubtedly to injure him financially, if not to destroy entirely the possibility of his continuing in the practice of his profession. To say then that the appellant will not be injured, or even that he will not be financially injured, by a judgment based upon a solemn determination by the court that he is guilty of a gross and unconscionable fraud, is absurd."

The construction placed upon the Indiana statute similar to Section 11262 of the Ohio General Code, by which the defamed attorney was allowed to intervene in the collateral action, was correct and was the only reasonable construction which the plain language of such statute permits. Whether or not the word "interest" when used in Section 11255 of the Ohio General Code means "property interest" is immaterial since the language of Section 11262 is quite different. The petitioners contend that their position at the present time is analogous to that of the defamed Indiana lawyer in *Dodd vs. Reese*. In being excluded from the Mandamus Proceeding, they suffered

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"prejudice to their rights" even as he did. They suffered a pecuniary loss even as he did.

Under the clear language of Section 11262, the Ohio Supreme Court was then confronted with the choice of allowing them to intervene or of dismissing the action. Since it did neither, but proceeded to hand down a judgment in their absence, it violated their rights under the Constitution of the United States by denying them the equal protection of the laws and by taking their property without due process of law.

Under Ohio Law, the Petitioners had a clear interest in this matter. Their actions begun in the Court of Common Pleas of Lucas County, Ohio, were brought in their capacity as taxpayers of Lucas County, Ohio (R. 183, 223) and were intended to halt abuse of discretion on the part of the Commission and to obtain other relief.

> "A taxpayer has sufficient interest to enjoin public officers from the commission of acts in excess of legal authority and requiring the expenditure of public money."
>
> *Greene vs. State Civil Service Comm.*, 1914, 90 O. S. 252, 255, 107 N. E. 531;
>
> *State ex rel. Van Harlingen vs. Board of Education*, 1922, 104 O. S. 360, 136 N. E. 196.

The members of the Commission were, under Ohio law, "officers" against whom a taxpayer's suit for equitable relief might properly be brought.

> "A public officer as distinguished from an employee must possess some sovereign functions of government, to be exercised by him for the benefit of the public, either of an executive, legislative or judicial character. It is well settled in the *Landis* case, *supra* (State *ex rel.* Landis vs. Board of Comm., 1917, 95 O. S. 157, 115 N. E. 919), that 'The chief and most decisive characteristic of public office is determined by the quality of the duties with which the appointee is invested, and by the

> fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office, and not an employment'."
>
> *State ex rel. Newman vs. Skinner,* 1934, 128 O. S. 325, 191 N. E. 127.

The statute under which the Ohio legislature established the Commission and set forth the duties, powers and responsibilities of the Commissioners clearly makes them "officers" within the above citation. (Act approved June 1, 1949, 123 Ohio Laws, 232 *et seq.*) The legislature in Section 1203 (Section 3 of the original statute) clearly indicated its intent that the Commissioners be public "officers" by requiring them to take the oath which Section 7 of Article XV of the Ohio Constitution requires of "every person chosen or appointed to any office under this state."

Since the Petitioners had a sufficient "interest" as taxpayers to file suit to restrain the Commission and the Commissioners from the doing of unauthorized acts, such Petitioners had a sufficient "interest" to fall within the meaning of Section 11255 of the Ohio General Code. Since they would suffer a loss in the value of their property if such unauthorized acts were done by the Commission, they had a "property" interest.

Since the Ohio Supreme Court in deciding the Mandamus Proceeding was obligated to decide many of the questions already before the Court of Common Pleas of Lucas County, Ohio, in the actions commenced by these petitioners, the Ohio Supreme Court could not do so without "prejudicing" the rights of the petitioners under Section 11262 of the Ohio General Code. And since there was no other practicable way of "saving their rights" under Section 11262, the Ohio Supreme Court should either have permitted the Petitioners to intervene in the Mandamus

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Proceeding or it should have dismissed the case without prejudice.

When the Supreme Court of Ohio in the Mandamus Proceeding handed down a judgment in the absence of the Petitioners it denied them the day in court which is indispensable to due process of law; and it also denied them the equal protection of the laws.

Under the "Due Process" clause in the Fourteenth Amendment to the Constitution of the United States, a person is entitled to a hearing in court before his rights are disposed of.

> "That to condemn without a hearing is repugnant to the due process clause of the Fourteenth Amendment needs nothing but statement" *White, C. J., in Riverside and Dan River Cotton Mills vs. Menefee*, 1915, 237 U. S. 189 at 193, 35 S. Ct. 579, 59 L. Ed. 910.
>
> "Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction (citing cases), and that there shall be notice and opportunity for hearing given the parties (citing cases.)" *American Land Co. vs. Zeiss*, 1911, 219 U. S. 47, 31 S. Ct. 200, 55 L. Ed. 97, quoting *Twining vs. New Jersey*, 1908, 211 U. S. 78 29 S. Ct. 14, 53 L. Ed. 97.

The possibility that the Mandamus Proceeding might have been decided adversely to the Petitioners even if that had been permitted to intervene in it, does not prevent their exclusion therefrom from denying them due process of law.

> "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Coe vs. Armour Fertilizer Works*, 1915, 237 U. S. 413 at 424, 35 S. Ct. 625, 59 L. Ed. 1027, citing *Rees vs. Watertown*, 1874, 19 Wallace 107, 22 L. Ed. 72.

PROPOSITION 3.

DENIAL OF EQUAL PROTECTION OF THE LAWS

Similarly the "Equal Protection of the Laws" clause of the Fourteenth Amendment to the Constitution of the United States, was violated by the denial by the State of Ohio, through the agency of the Ohio Supreme Court, of the motion of the Petitioners to intervene in the Mandamus Proceeding, although under Ohio statutory law they were so entitled to intervene, while at the same time the Ohio Supreme Court permitted the other parties to proceed with such litigation. To grant a remedy to certain persons which is denied to others in like circumstances violates the "equal protection of the laws" clause. *Bogni vs. Perotti*, 1916, 224 Mass. 152, 112 N. E. 853, L. R. A. 1916 F 831. Most of the cases which have arisen under the "equal protection of the laws" clause have involved statutes which were alleged to violate it. However, there is no reason why this clause may not be violated by the conduct of the State Judiciary, in a way analogous to violations of the "due process" clause. Both clauses are part of the Fourteenth Amendment. Both limit the authority of the individual States. If a State court may violate the "due process" clause by its arbitrary conduct of litigation, then a State court may violate the "equal protection of the laws" clause by doing that which would be unconstitutional if done by a State legislature.

The Supreme Court of Ohio should not have passed upon the constitutionality of the Turnpike statute and the manner of its administration, in a friendly suit brought by a Commission against its own Secretary-Treasurer.

> "Whenever in pursuance of an honest and actual antagonistic assertion of rights by one individual

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against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and

"the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." *Chicago and Grand Trunk Railway Company vs. Wellman,* 1892, 143 U. S. 339 at 345, 12 S. Ct. 400, 36 L. Ed. 176.

Although the passage above quoted was uttered in a case where the purpose of friendly litigation was to have the statute declared unconstitutional, it applies equally well where the purpose of the friendly litigation was to have the statute declared constitutional. The Mandamus Proceeding was such a friendly suit. On June 4, 1952, Mr. Archibald J. Allen, Secretary-Treasurer of the Turnpike Commission refused to affix the seal of the Commission to a trust agreement and to attest the same as required by law. Within a few hours, and still on June 4, 1952, the Commission through its Counsel, filed a petition with the Ohio Supreme Court in which it asked for a writ of mandamus against the said Archibald J. Allen (R. 13). The very next day he filed his answer (R. 133) in which he attacked the constitutionality of the Turnpike statute; and immediately and simultaneously at the same time a demurrer to his answer (R. 173) and

printed briefs both in support of and in opposition to such demurrer, were filed. Mr. Allen furthermore signed and filed a document through counsel dated July 9, 1952 in which he promised to abide by the decision of the Ohio Supreme Court and to take no steps thereafter to have it reviewed if it proved to be against his position in the litigation (R. 2). Actually, Mr. Allen had nothing to gain and everything to lose if the Ohio Supreme Court had sustained his answer since a decision that the Turnpike legislation was unconstitutional would have ended the existence of the Turnpike Commission and terminated his employment as its Secretary-Treasurer. The case was set for oral argument on June 10, 1952. On June 9, 1952, the Petitioners, Mr. Balduf, and Mr. and Mrs. Raymond P. Greene, whose cases involving the constitutionality of the Turnpike legislation had been pending in the Court of Common Pleas of Lucas County, Ohio, as above related, filed their motion to intervene in the Mandamus Proceeding (R. 173); and on the morning of June 10, 1952, they placed in the hands of the Clerk of the Ohio Supreme Court their duly verified Answer in said Mandamus action (Exhibit A), and the disposition thereof by the Supreme Court of Ohio has been related above herein in Summary and Statement of Matter Involved. (Page 3, *supra*).

The foregoing indicates that the Mandamus Proceeding was clearly a friendly suit. The Supreme Court of Ohio did not have the advantage of an argument growing out of "an honest and actual antagonistic assertion of rights by one individual against another," in the language of *Chicago and Grand Trunk Railway Company vs. Chicago, supra,* but on the contrary excluded the very persons who could have aided the Court with such an argu-

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ment, namely the Petitioners. In so doing it violated the constitutional rights of such Petitioners by denying them "Due Process" and the "Equal Protection of the laws."

CONCLUSION

That these petitioners were nowhere considered in the mandamus action is obvious from the fact that neither the petitions of the relator nor the answer of the respondent or the brief filed on behalf of either party, makes any mention whatsoever of the two cases pending on the docket of the Court of Common Pleas of Lucas County. In this instance again the record before the Ohio Supreme Court in the mandamus proceeding will be fatally defective, unless these petitioners successfully maintain their right to be named as parties therein and file their answer, which will place in the record all necessary and pertinent facts pertaining to the Lucas County litigation.

Under the Federal Rules of Civil Procedure, and more particularly under Rule 24, the law has been well established in Federal Court procedure that where a party has an absolute right to intervene, denial of intervention is appealable since there is no other way in which the party can assert his interest and he cannot appeal from any subsequent action in the proceeding if he is not a party. *Brotherhood of Railroad Trainmen vs. Baltimore and Ohio R. R. Co., et al.*, 331 U. S. 519 91 L. Ed. 1646.

An order denying leave to intervene as of right is final since it decides questions of substantive legal right. An order denying permissive intervention is final only if the applicant for intervention has no other adequate means of asserting his rights. In the case of *Cameron vs.*

President and Fellows of Harvard College, et al 157 F. (2d) 993, the syllabus reads as follows:

> 1. An application for permission to intervene must be timely, whether asserted as a matter of legal right or requested as a matter of judicial discretion.
>
> 2. Decisions denying applications to intervene as of right purport ultimately to decide questions of substantive legal right and hence are final and appealable.
>
> • • • • •
>
> 4. Decisions reached by an exercise of judicial discretion ordinarily are reviewable, if they are final, although on appeal the scope of review is limited to the question of abuse of discretion.

From the foregoing, it is apparent that the petitioners herein have a right to intervention and that such a decision as that of the Ohio Supreme Court denying intervention, in Federal Civil Procedure would certainly be reviewable as of right as well as on the ground of abuse of discretion. Petitioners contended that if such decision in a Federal Court constitutes an invasion of constitutional rights, then such rights are likewise invaded by a decision of a state supreme court as in the present instance.

On the question of denial of due process by a state judiciary the attention of the court is directed to the case of *Brinckerhoff-Farris Trust & Savings Co. vs. Hill* (281 U. S. 673-682, 74 L. Ed. 1107) wherein Justice Brandeis on page 679 states as follows:

> "the said guaranty of due process extends to state action through its judiciary as well as legislative, executive or administrative branch of the government."

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Further on he states "whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." See also, *Postal Teleg. Cable Co. vs. Newport,* 247 U. S. 464, 62 L. Ed. 1215, 38 Sup. Ct. Rep. 566. In this case, the court stated that "the right to be heard is an essential requisite of due process of law in judicial procedure."

With reference to the question of right of appeal from an order refusing intervention, where intervention is a matter of right, the attention of the court is directed to the case of *Mack vs. Passaic National Bank and Trust Company,* 150 F. (2d) 474; *Cresta Blanca Wine Company, Inc. vs. Eastern Wine Corporation,* 143 F. (2d) 1012.

It is further submitted to the Court that the motion to intervene in the instant case was both timely and adequate. Considering that the mandamus action was filed in the Ohio Supreme Court on June 4, 1952 (R. 13), and all pleadings filed simultaneously and the matter set for oral argument on June 10, 1952, nonetheless these petitioners were able to file their motion to intervene, together with all necessary documents and transcript of records in support thereof on June 9, 1952 (R. 183), and had prepared and submitted to the Clerk of the Ohio Supreme Court their answer on the morning of June 10, 1952.

WHEREFORE, for the reasons above given, the petitioners respectfully pray that a Writ of Certiorari be issued to the Supreme Court of the State of Ohio to the end that this cause may be reviewed on the question of the right of these petitioners to intervene therein, and that

the judgment of the Ohio Supreme Court in denying th
motion to intervene be reviewed and that petitioners b
allowed to file their answer and participate as a part
therein, and that the decision of the Ohio Supreme Cou
sustaining the demurrer and allowing the Writ of Mand
mus be vacated.

Respectfully submitted,

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Columbus, Ohio

ROBERT C. RAGAN.
Toledo, Ohio
Attorneys for Petitioner

OTTO L. HANKISON,
DANIEL J. MCKENNA,
Toledo, Ohio,
Of Counsel.

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APPENDIX A

IN THE SUPREME COURT OF OHIO

State of Ohio, ex rel,
Ohio Turnpike Commission, Relator,

vs.

Archibald J. Allen, as Secretary-Treasurer of Ohio Turnpike Commission, Respondent.

Case No. 33129

ANSWERS OF RESPONDENTS,

Carl R. Balduf, Raymond P. Greene and Joanne J. Greene.

Now come the Respondents, Carl R. Balduf, Raymond P. Greene and Joanne J. Greene, and for their answer to the petition of Relator for a peremptory Writ of Mandamus against Respondent Archibald J. Allen, state as follows:

1. Respondents state that, on March 11, 1952, Respondent Carl R. Balduf filed an action in the Common Pleas Court of Lucas County, Ohio, being Case No. 175811 on the docket of said Court; that the petition in said action alleges certain acts of gross abuse of discretion on the part of Relator and that a separate Cause of Action alleges the unconstitutionality of the Ohio Turnpike Act on various grounds, and the prayer of the Petition in said action is to declare said Ohio Turnpike Act unconstitutional and of no effect, and that said Ohio Turnpike Commission and its individually named members be permanently enjoined

from the expenditures of further taxpayers' funds or from taking any further action pursuant to said Ohio Turnpike Act, including Section 1208 thereof, as amended; that Relator, Ohio Turnpike Commission, its members, and the City of Maumee, are parties defendant in said action; that all of the constitutional questions raised in this mandamus proceeding are raised in the Common Pleas Court action; that Respondent, Carl R. Balduf, filed said proceedings in good faith and as a taxpayer, after a demand in writing had been made upon and rejected in writing by the duly appointed and acting City Solicitor of the defendant, City of Maumee; that Relator herein submitted to the jurisdiction of said Common Pleas Court by filing its answer therein and that said Relator has requested and said Common Pleas Court has set a date for trial of the issues in the above case on July 21st, 1952; that defendant, City of Maumee, has likewise submitted to said jurisdiction and has filed its answer therein; that said action is now pending on the docket of said Court; that, by reason of the pendency of said action and the conduct of Relator in submitting and consenting to the jurisdiction of the Court of Common Pleas of Lucas County, the Relator is barred from bringing this action in mandamus before this Court, for trial of the factual issues giving rise to the constitutional issues and other factual issues, as alleged, cannot be had; that said action in the Court of Common Pleas affords adequate remedy to all parties now before this court, and that this action in mandamus is an obvious effort to circumvent the rights of these respondents in the prior pending case. Copies of plaintiff's petition, answer of the relator, and the answer of the City of Maumee in said Cause No. 175811 are attached to these repsondents' motion to intervene herein, and by reference are incorporated herein.

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2. Respondents further state that, on May 28, 1952, Respondents Raymond P. Greene and Joanne J. Greene, filed their action in the Common Pleas Court of Lucas County, Ohio, being Case No. 176131 on the docket of said Court; that the petition in said action alleges certain acts of gross abuse of discretion on the part of Relator and that a separate Cause of Action alleges the unconstitutionality of the Ohio Turnpike on various grounds, and the prayer of the petition in said action is to declare said Ohio Turnpike Act unconstitutional and of no effect, and that said Ohio Turnpike Commission and its individually named members be permanently enjoined from the expenditures of further taxpayers' funds or from taking any further action pursuant to said Ohio Turnpike Act, including Section 1208 thereof, as amended; the Relator has filed, on June 2, 1952, a motion in response to the petition therein; that the Relator Commission and the members thereof have been duly served with process therein; that, at the date hereof, no action has been taken by Relator to resist the jurisdiction of the Court of Common Pleas in this case; that this action was brought in good faith and after demand and rejection in writing upon the City of Maumee to file said suit, and that the same is now pending on the docket of said Court; that, by reason of the pendency of said action, the Relator herein is barred from bringing this action in mandamus before this Court, where trial of the factual issues giving rise to the constitutional issues and other factual issues, as alleged, cannot be had; said action in the Court of Common Pleas affords adequate remedy to all parties now before this Court, and that the filing of this action in mandamus is an obvious effort to circumvent the rights of these respondents in the prior pending case.

3. Respondents admit that the Ohio Turnpike Act designates the Ohio Turnpike Commission as a body, both corporate and politic, and respondents admit all the other allegations set forth in paragraphs 1 and 2 of the petition filed by relator herein; deny generally the allegations in paragraph 3; for want of knowledge and information, deny both generally and specifically, all the other allegations set forth in the petition of Relator not herein admitted.

4. Respondents admit all and singular the allegations and averments set forth under oath in the answer filed herein by Respondent Archibald J. Allen, except the allegations and averments of said answer which constitute admissions of allegations in Relator's petition.

5. Respondents further answer and state that the allegations set forth in paragraph 2 of the answer of Respondent Archibald J. Allen aver facts showing the intention of the relator to appropriate and confiscate public lands, together with the use thereof as security for the repayment of the proposed bonds, together with interest thereon, and thus create a direct pledge of the faith and credit of the State of Ohio, and are in violation of the constitution of the United States and the constitution of the State of Ohio.

6. Respondents state that the facts stated in paragraph 3 of the aforesaid answer of Respondent Archibald J. Allen show the intention and purpose of Relator to directly violate the Home Rule provision of the Constitution of the State of Ohio, being Art. 18, Sec. 7 of said Constitution of the State of Ohio.

7. Respondents further state that the facts alleged and averred in paragraph 6 of the aforesaid answer of Respondent Archibald J. Allen are a violation of the Constitution of the United States and of the Constitution of the State of Ohio; that the said proclamation of the

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Governor, marked "Exhibit C" and incorporated in the petition of Relator, was in itself illegal and was exceeded by the 99th General Assembly in special session, as stated, and that Section 1208 of the Ohio Turnpike Act as originally enacted by the 98th Session of the General Assembly containing the following provision:

> "1. For the appropriation of such property, the Commission shall have the same powers and be governed by the same procedures as the State Highway Director, insofar as applicable; provided, however, that a compensation for the property so taken shall first be made in money as provided by law; .... "

that the action of the 99th Special Session of the General Assembly in deleting the above provisions from Amended House Bill 674 of the Ohio Turnpike Act and in enacting in place of said original Section 1208, said Amended House Bill 674, both exceeded the proclamation of the Governor under which said Special Session was convening and further attempted to confer a higher and greater power of eminent domain upon the Relator than that possessed by the State of Ohio, itself, in that the State, acting through the Director of Highways, is required by the provisions of Section 1178-42 of the General Code of Ohio to first obtain the consent of the council on other legislative authority of such municipal corporations to enter into a municipality of the State of Ohio for purposes of highway construction or improvement.

8. Respondents further state that the facts alleged in Paragraph 4, 5, 7, 8, 9, 10, and 11 of the answer of Respondent Archibald J. Allen filed herein, are direct violations of the Constitution of the United States and the Constitution of the State of Ohio.

9. Respondents further state that the provisions of

the Ohio Turnpike Act specifically state in Section 1203, as follows:

> "There is hereby created a Commission to be known as the 'The Ohio Turnpike Commission,' and by that name the Commission may sue and be sued, plead and be impleaded. The commission hereby created is a body both corporate and politic in the State of Ohio, and the exercise by the commission of the powers conferred by this act*****shall be deemed and held to be essential governmental functions of the state*****".

Respondents further state that Relator, by virtue of the above provisions of Section 1203, is a public corporation, created by an Act of the Legislature of the State of Ohio; that Relator is not legally and officially constituted to bring this action in mandamus, as against one of its own members, who stands in no higher or greater position than Relator Commission, of which Relator Archibald J. Allen is a member, and as such is not a public official in the sense that he can be reached in mandamus proceedings; that Relator is wholly without authority in law to bring this action by the usurping of the authority of the State of Ohio, solely for the purpose of bringing this summary proceeding under the style of the caption of this case.

10. Respondents further answer and state that Relator Commission has attempted illegally to assume the power and authority of the State of Ohio in bringing this action, yet has stated repeatedly in its petition that the bonds proposed to be issued under the provisions of Section 1202 of the Ohio Turnpike Act for the construction of Ohio Turnpike Project No. 1 are not an obligation of the State of Ohio; that the action of Relator in the proposed issuance and sale of bonds in the contemplated amount by the Relator in either the capacity of a department or agency of the State, or as a public corporation, is in direct

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violation of the constitutional provisions and requirements of Article VIII, Sections 1 and 3 of the Constitution of the State of Ohio.

WHEREFORE, having fully answered, Respondents pray that the application for a peremptory Writ of Mandamus be dismissed and that they may have their costs.

Danial J. McKenna,
Toledo, Ohio

Robert C. Ragan,
Toledo, Ohio

Otto L. Hankison,
Toledo, Ohio

Arthur M. Sebastian,
Columbus, Ohio

Attorneys for the Respondents

State of Ohio, County of Lucas, ss:

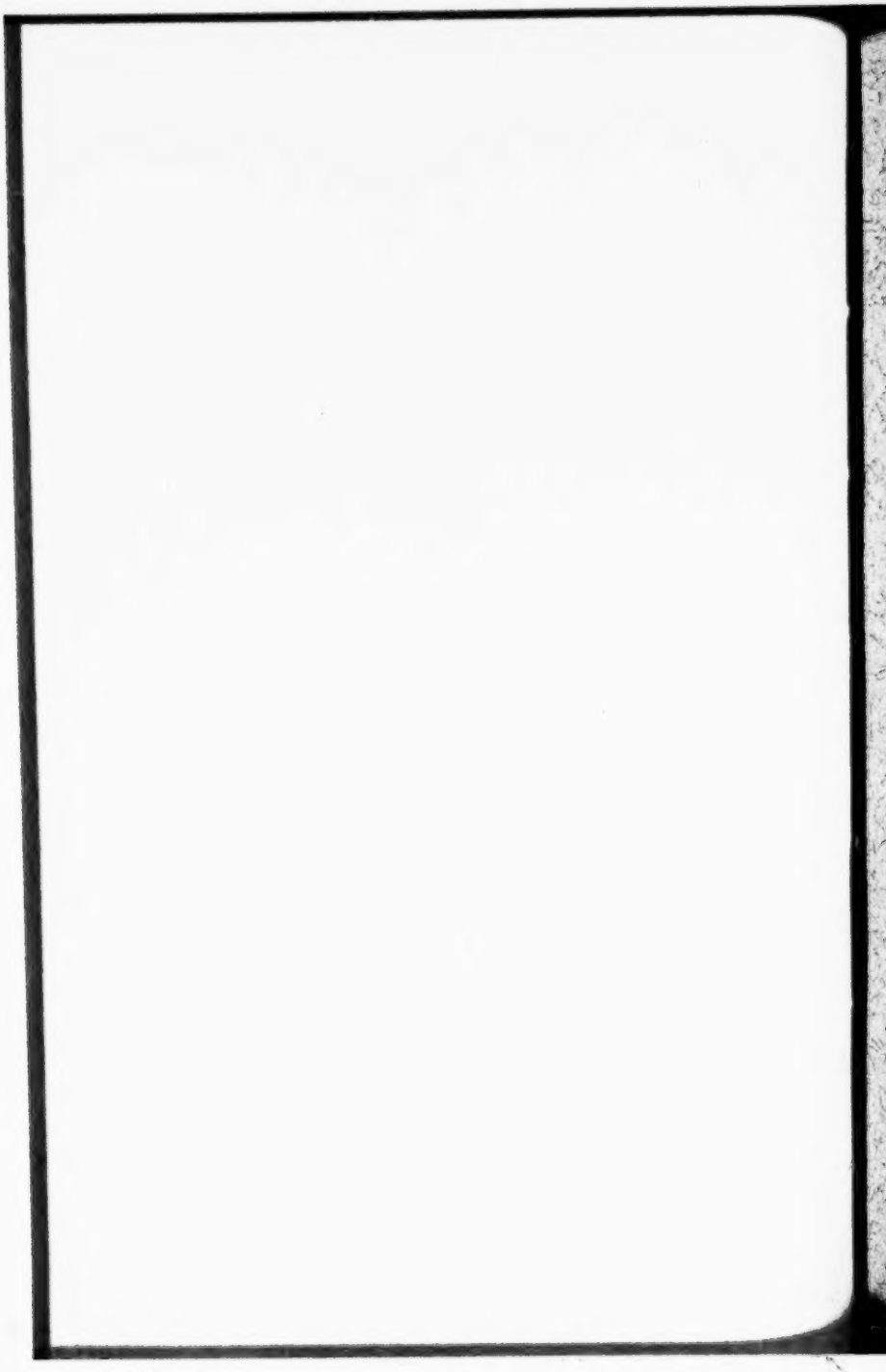
Before me, a Notary Public in and for said County and State, personally appeared Carl R. Balduf, Raymond P. Greene and Joanne J. Greene, who, being first duly sworn, state that they are the Respondents in the above entitled action and that the statements in the foregoing Answer are true, as they verily believe.

Carl R. Balduf
Raymond P. Greene
Joanne J. Greene

Sworn to before me and subscribed in my presence this 9th day of June, 1952. Robert C. Ragan.

Notary Public, State of Ohio. My Commission expires Sept. 23, 1952.

(Seal).



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FILED
OCT 16 1952
CHARLES ELMORE CROPLEY

In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 323.

CARL R. BALDUF, RAYMOND P. GREENE and JOANNE J. GREENE,

Petitioners,

vs.

OHIO TURNPIKE COMMISSION and ARCHIBALD J. ALLEN, SECRETARY-TREASURER OF THE OHIO TURNPIKE COMMISSION,

Respondents.

BRIEF FOR OHIO TURNPIKE COMMISSION OPPOSING CERTIORARI.

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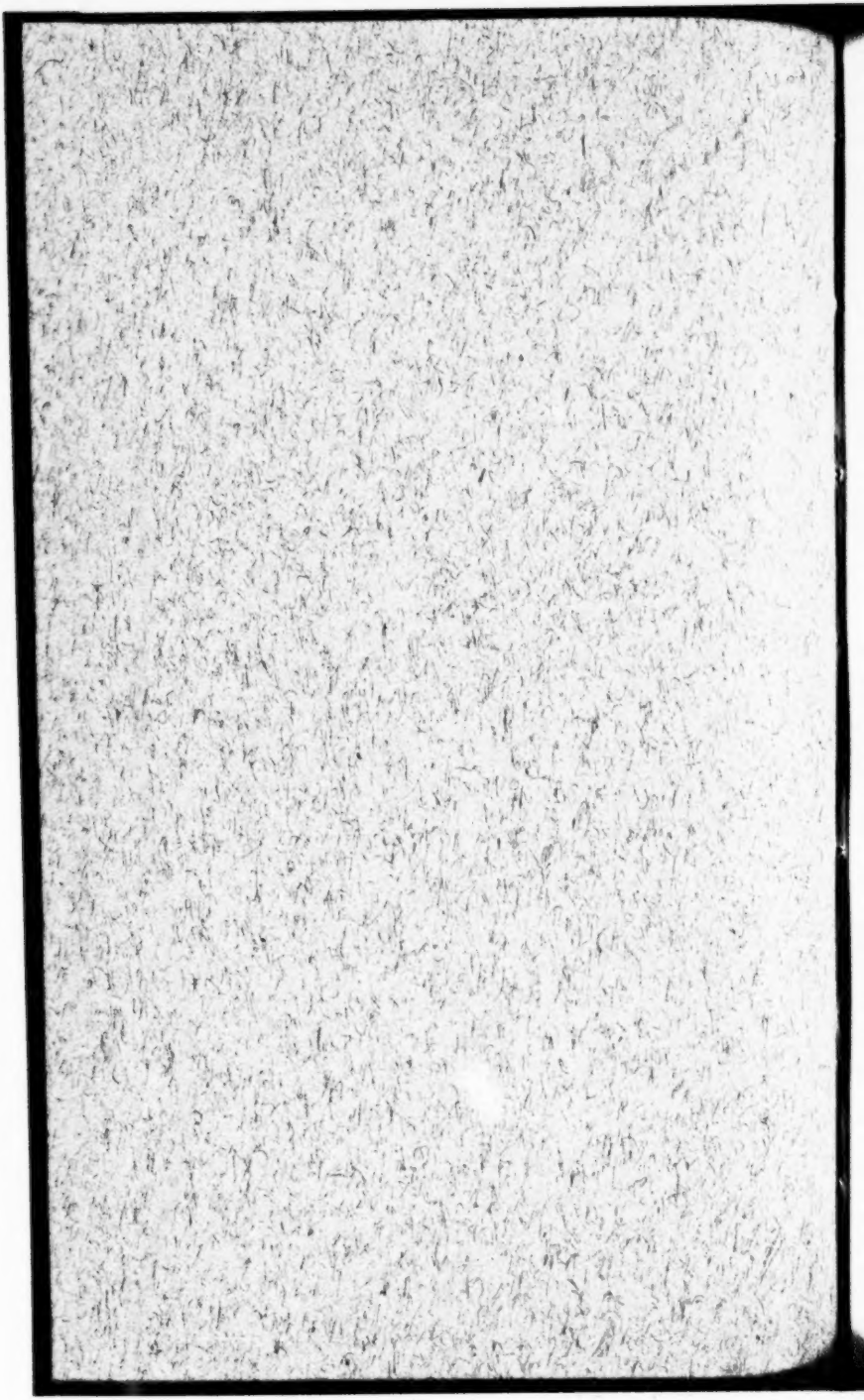

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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 323.

CARL R. BALDUF, RAYMOND P. GREENE and JOANNE J. GREENE,

Petitioners,

vs.

OHIO TURNPIKE COMMISSION and ARCHIBALD J. ALLEN, SECRETARY-TREASURER OF THE OHIO TURNPIKE COMMISSION,

Respondents.

BRIEF FOR OHIO TURNPIKE COMMISSION OPPOSING CERTIORARI.

Essence of Commission's Response.

The respondent, Ohio Turnpike Commission, maintains that the petition for writ of certiorari does not present any federal question of substance and that the cause has become moot.

Statement of the Case; No Opinion Rendered Below On Ruling From Which Petitioners Appeal.

The Commission as Relator on June 4, 1952 sought a writ of mandamus against its Secretary-Treasurer, also a respondent herein, from the Supreme Court of Ohio to compel said officer to seal, attest and deliver a Trust

Agreement and $326,000,000 of Turnpike Revenue Bonds to pay the cost of Turnpike Project No. 1 in Ohio. (R. 13.)

The Secretary-Treasurer filed his answer on June 5, 1952. (R. 133.) Relator demurred to the answer on the ground "that it does not state a defense." (R. 173.)

Petitioners herein moved the Ohio Supreme Court on June 9, 1952 for leave to intervene, become respondents and file answers. (R. 173.) Their motion was overruled on June 10, 1952,* but they were then given leave to file a brief *Amicus Curiae*. This they did on June 18, 1952. (R. 2 and petition here, p. 4.)

No opinion was rendered in denying the petitioners' motion or application for reconsideration, but on July 9, 1952 the Ohio Supreme Court sustained relator's demurrer and allowed the requested writ of mandamus, supporting the same with an opinion which is printed in the Record at pages 4 to 13 and is published in Ohio Bar dated July 14, 1952 and is to be 158 Oh. St. 168 and 107 N. E. 2d 345.

Questions Presented and Summary of Argument.

Petitioners seek to have this Court review the orders of the Supreme Court of Ohio, which denied them leave to intervene in said mandamus proceeding. They invoke the court's jurisdiction under 28 U. S. C., sec. 1257 (3) which authorizes the court to review final judgments of state courts of last resort by writ of certiorari when any proper right is specially claimed under the Constitution or statutes of the United States.

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* Petitioners applied on June 12, 1952 to the Ohio Supreme Court for reconsideration of their motion and this was refused on July 9, 1952.

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This Court's Rule 38 (5a) is that a review on writ of certiorari "will be granted only where there are special and important reasons therefor" such as—

> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The petitioners' brief concludes as to the "questions presented"—

> "* * * the only question is as follows: 'Did the Supreme Court of the State of Ohio deprive these petitioners of their constitutional rights by overruling the motion filed in the mandamus action before said Court?' " (Their brief, p. 7.)

That question, we argue, does not present any federal point of substance and has become moot. The questions are—

1. In a mandamus proceeding, in a state supreme court, not involving any fund, property, office or other right in which the petitioners have a proprietary interest, are petitioners denied a federal right by refusal of the state court to admit them as parties respondent when the decision will affect them only as a precedent, favorably or unfavorably?

2. After a state official has complied with a writ of mandamus of the state's highest court directing him to sign and deliver an agreement and revenue bonds, and the bonds have been sold to the investing public, is a question as to the right of third parties to intervene in the mandamus proceedings moot?

Petitioners sought to inject themselves into a mandamus proceeding by the Commission against its Secretary-Treasurer pending in a state court, Ohio's highest, al-

though their proposed answer* admits, indeed alleges, that "all of the constitutional questions raised in this mandamus proceeding are raised in the Common Pleas Court" actions they had pending in Lucas County, Ohio, that the actions in the Common Pleas Court "affords adequate remedy to all parties now before this Court," and that "trial of the factual issues giving rise to the constitutional issues and other factual issues, as alleged, cannot be had" in the mandamus proceeding. (Petitioners' brief, pp. 32 and 33.)

The ruling of the Supreme Court of Ohio rejecting the petitioners' effort to intervene in the mandamus case did not affect their right to proceed in the forum they had chosen and which they considered to be adequate and the only court appropriate to try the factual issues they wished to assert. The Ohio Supreme Court confined itself to *legal* questions and heard the petitioners as *Amicus Curiae* on the legal questions. They began their brief as *Amicus Curiae* by saying that "after careful study of the pleadings and briefs of Relator and Respondent herein"—

> "It is considered that the answer, and more especially the brief of the Respondent, Archibald J. Allen, well states the numerous issues set forth in such documents and these parties subscribe without reservation to the arguments advanced to this court by the Respondent."

How, then, could remittance of the petitioners to the state court that they considered competent to try the factual issues of their claims give rise to any federal question? When properly analyzed, the contention of the peti-

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* The proposed answer was not attached to petitioners' motion for leave to intervene and does not appear in the Record. It is represented by the petitioners that Exhibit A to their petition and brief (pp. 31-37) is a copy of their intended pleading.

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tioners here is only that the Supreme Court of Ohio erred in application of three sections of the state statutes (their petition and brief, pp. 5-6) regulating state court procedure and practice. [This was first made evident by petitioners' "Brief in Support of Motion to Intervene" which is in the Record here at pages 175 to 183.] But state courts of last resort do not err on such questions because their views thereon are conclusively right.* The petitioners were left with the privilege of trying their cases in the court of their choice and if necessary, of marching through the Ohio appellate courts and up to this Court on any federal question of substance.

Moreover, the question as to whether the petitioners should have been allowed to become parties in the mandamus case has become moot, just as that question never would have arisen if respondent Allen had ignored the rumors which caused doubts in his mind as to his legal duty and had sealed, attested and delivered the Trust Agreement and the bonds without hesitation. Mr. Allen, according to his affidavit filed with the Clerk and of which a true copy is appended to this brief, has complied completely with the mandate of the Supreme Court of Ohio as he was free to do and under compulsion to do. The petitioners had not sought or obtained any stay from the Ohio Supreme Court or from this Court, or any restraining order from the Court of Common Pleas for Lucas County (R. 239-247) or from any other court. The bonds are in the hands of the investing public for valuable consideration. Certiorari should be denied when a cause has thus become moot.

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* The rulings of the Ohio Supreme Court from which petitioners appeal will be shown hereinafter to have been in accord with well established practice in Ohio.

ARGUMENT AND AUTHORITIES.

NO FEDERAL QUESTION OF SUBSTANCE IS PRESENTED.

Petitioners' References to Their Tax-paying Status is Immaterial.

The petitioners state that their actions pending in the Lucas County Common Pleas Court were "brought as property owners and taxpayers on behalf of the plaintiffs (themselves) and all other persons similarly situated"; that their class is of owners of property *not* in the path of the Turnpike and as to which they concede, under the law of Ohio, damage, if any,* is not compensable. (Petitioners' brief, pp. 16-17.)

Petitioners' motion for leave to intervene in the mandamus case was as individuals identified as plaintiffs in two actions pending in Lucas County. (R. 173-174.) The pleadings in the Lucas County cases attached to said motion (and the petition-brief herein at some places) recite as *descriptio personae* that the plaintiffs therein are taxpayers in the city of Maumee, county of Lucas and state of Ohio, but neither said motion nor the petition here attempts to maintain that petitioners were purporting to intervene on behalf of the state or Lucas County or Maumee.

The state was officially and actually represented by its Attorney General. (R. 1, 5.) No demand is alleged to have been made on the Prosecuting Attorney of Lucas County under any section of the General Code of Ohio as preliminary to suing on behalf of the county. Petitioners impliedly concede that their effort to intervene was not on behalf of the city of Maumee (their brief here, p. 6). *A fortiori,* no attempt is made to show that petitioners could,

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* Petitioners ask this court "to take judicial knowledge" that the proposed Turnpike running somewhere near their property will lessen its value!!!

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under the law of Ohio, speak for a city in asking leave to intervene in such a mandamus case or that any federal right of Ohio taxpayers would be violated if such a political creature of the state were denied recognition in a suit between other parties.

Incidentally, all of the salaries, expenses and costs of the Ohio Turnpike Commission and of constructing, operating and maintaining the Turnpike are paid or to be paid from the proceeds of the Turnpike Revenue Bonds or from tolls for using the Turnpike, and the bonds comply with requirement of the Trust Agreement that—

> "Section 1305. Nothing in the bonds or coupons or in this Agreement shall be construed as pledging either the faith and credit or the taxing power of the state of Ohio or any political subdivision thereof for their payment, or to create any debt against said State or any political subdivision thereof." (R. 130; 47, 53.)

Moreover, this Court does not review efforts of "a citizen and taxpayer" to invalidate a state law which does not result in any direct pecuniary injury to him differing from the effect upon people generally. *Doremus v. Board of Education,* 342 U. S. 429 (1952); *Frothingham v. Mellon,* 262 U. S. 447, 487-8 (1923). This could never be in the case at bar since no property of the petitioners was involved; the bonds are merely revenue bonds and no action under the law would or could affect petitioners' taxes, *a fortiori,* no action would or could affect them peculiarly. Opinions are quite unanimously against any common law right of citizens and taxpayers to interfere with the use of state funds not raised by taxation. 131 *A. L. R.* 1230.

In such cases, only the Attorney General can speak for the State of Ohio, section 333 O. G. C., and he did so in the court below; otherwise there might be conflict between the policy and strategy of the official representative

of the state and of the public spirited taxpayer. There is no statutory right in Ohio for taxpayers to sue on behalf of the state; more especially, no statutory right to *defend* mandamus cases, as there is for taxpayers to maintain some types of claims on behalf of counties and municipal corporations. Thus the petitioners were in less favorable position than the taxpayer who sought to intervene in *Cincinnati v. Kellogg*, 153 O. S. 291, for which the syllabus by the Court is:

> "Where the solicitor of a municipal corporation has instituted a suit for an injunction under the provisions of Section 4311, General Code, at the request of a taxpayer, and the trial court finds that the solicitor is proceeding in good faith and with due diligence, the court is not in error in refusing to allow the taxpayer to become a party to the action."

As the city did not try to become a party in the mandamus proceedings and is not petitioning for any review by this Court, the complaint by the petitioners that the Ohio Supreme Court, on its own order, should have made the City of Maumee a party to the mandamus proceedings (petitioners' brief, pp. 6 and 7) will be ignored hereinafter.

No Property Rights of Petitioners Were to be Adjudicated or Prejudiced in the Mandamus Proceeding and Petitioners Were Not Necessary Parties to the Issues of the Case.

As "Reasons Relied On For Allowance Of The Writ," the petitioners confine themselves (their brief, pages 8 to the end) to expounding sections 11255 and 11262 of the Ohio General Code, to criticism of the Supreme Court of Ohio for entertaining a suit by the Turnpike Commission against its Secretary-Treasurer, and to non-sequitur as-

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sertions that alleged errors of the Ohio Supreme Court in applying the state statutes, by denying them the position of parties respondent in the mandamus case, deprived them of property without a hearing and denied them the equal protection of the laws.

Petitioners do not enlighten us an iota as to the property right or interest that they had in the subject matter of the litigation between the parties to the mandamus case and of which they were deprived without notice and hearing. The facts that the mandate was executed and the bonds marketed illustrates conclusively that the petitioners' presence in the Ohio Supreme Court was not essential to complete determination and settlement of the questions involved therein. Whatever real rights they had by virtue of owning property somewhere near the proposed (but changeable, R. 101) route was saved to them through maintenance and prosecution of their Lucas County actions or such other remedies as might be advised. Any prejudice to their legal theories, as distinguished from "interest" and "rights" to which sections 11255 and 11262, O. G. C., refer, would not operate in respect to any federal question to which this Court confines itself.

The petitioners' bitter tears are that if their Lucas County cases reach the Supreme Court of Ohio for review, they will be confronted with views expressed by the court when they had been heard only as *Amicus Curiae*. But petitioners concede that the Ohio Supreme Court did not, in the mandamus case, decide any question arising under the Constitution of the United States that is presented in their Lucas County cases (their brief here, p. 18). As far as Ohio state law is concerned, every case involves legal principles that the lawyers for the parties in the case had no part in forming, some of the principles dating back to Blackstone and Coke. No wonder "The Petitioners submit

that they are unable to find authorities, whether in Ohio or elsewhere, directly in point on this matter * * *" (their brief here, p. 18) of an alleged right to become a party in a case merely because the applicant is interested in the legal principles that may be announced. Ohio has several million property owners and taxpayers who might qualify as intervenors in most cases if the petitioners' contentions had merit.

The contention (in their brief, pp. 24-27) that petitioners were denied equal protection of the laws because respondent Allen was permitted to challenge the constitutionality of the Turnpike Act whereas petitioners were not permitted to become parties in the case must be one of the new ideas for which petitioners could not find authority. Whether a state court should act or decline to act in "a friendly suit" to command "the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station" (Section 12283, General Code of Ohio) while remitting those other than the official respondents, who would like to prevent such official action, to other courts or a separate case in their own asserted right is not a federal question. They are not denied the equal protection of the laws as they are not in the same classification and position as the reluctant official. However non-belligerent the Secretary-Treasurer may have been, the petitioners complimented his answer and brief in the mandamus case and do not criticise the independence, competency, industry or vigor of the law firm that represented him, and petitioners were heard *Amicus Curiae*.

The mandamus proceeding was to determine the official duty of respondent Allen. (Section 12283, O. G. C.) Ohio's General Code chapter on Mandamus provides

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for service of process only upon the delinquent official or officials (Sections 12286, 12289, 12291), and for pleadings only by such respondent or respondents (Section 12292). There is no reference incorporating section 11255 or 11262 upon which the petitioners rely. It is only with respect to pleadings, trial and review that code provisions elsewhere are incorporated by reference. Section 12295 is:

> "12295. Pleadings. The pleadings shall have the same effect, must be construed, may be amended, and issues of fact made by them must be tried, and further proceedings thereon had, in the same manner as in civil actions."

The relator in the mandamus case was not seeking an order affecting any fund, property, office or other right in which the petitioners had any proprietary interest.

State ex rel. Donsante v. Pethtel, 158 O. S. 35 (1952), was an action to compel county officials to reinstate certain special assessments on the tax list. Property owners, whose lands would have been directly affected by this special assessment, intervened and attempted to establish the defenses of laches and estoppel. A pertinent sentence in the opinion of the court is:

> "This is an action only to compel public officials to perform their official duties, and it is not necessary to make third persons parties defendant, although they may be affected by the order." (p. 41.)

In *State, ex rel. City of Dayton v. Patterson,* 93 O. S. 25 (1915), the city sought to compel the Budget Commissioners of Montgomery County to reduce each public agency's budget ratably rather than to exercise discretion in reducing the total budget to the ten mill maximum. The court said:

> "It is suggested by counsel for the defendants that in this matter the rights of the board of education had

become fixed and that it was a necessary party to this proceeding. * * * A proceeding in mandamus is statutory and the only order that can be made is against the defendant, commanding the performance of an act which the law enjoins as a duty resulting from the office, trust or station. Such an order, in many cases, may affect many persons. But it is certainly unnecessary to make such persons parties to the proceeding." (p. 36.)

Cincinnati College v. Yeatman, 30 O. S. 276 (1876), was a mandamus action by a lessor to compel the auditor of Hamilton County to transfer certain property on the tax duplicates to the lessee's name. Evidently the auditor argued that the lessee was a necessary party but the court dismissed this contention by stating:

"Neither do we think that the association is a necessary party, nor that mandamus is not the proper remedy.

"The association is not concluded by these proceedings. As between the relator, in whose name the entire property is taxed, and the auditor, the question is one of the non-performance of official duty.

"The relator has the statutory right to be relieved from the payment of taxes on property it does not own and has conveyed to another, whether it is charged to the association or not." (p. 287.)

It is also the rule in federal court proceedings that persons who are only interested collaterally are not entitled to intervene and defend a mandamus case. *Normandy Beach Development Co. v. U. S. ex rel. Brown-Crummer Inv. Co.*, 69 F. 2d 105 (5 C. C. A., 1934).

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Ohio Supreme Court's Decision That Ohio's Statutes Did Not Entitle the Petitioners to Intervene in the Mandamus Case Is Conclusive; a Contrary Opinion by Petitioners Cannot Create a Federal Question.

Whether the petitioners should be allowed to intervene in the mandamus case or be left to protection of their rights through prosecution of their Lucas County cases or some other action in a court of original jurisdiction is a matter of Ohio state procedure.

In the case of *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557 (1898), the matter was considered too well settled to be even argued:

> "It is not questioned by counsel that the settled rule of this court in cases of this kind is to accept the construction placed by the Supreme Court of the State upon its own constitution and statutes as correct." (p. 566.)

The rule is well expressed in *Snyder v. Massachusetts*, 291 U. S. 97 (1934), in which the court said:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (p. 105.)

The conclusiveness of a state's determination in matters of procedure applies to questions of proper and necessary parties. In *City of Boston v. Jackson*, 260 U. S. 309 (1922), the rule is stated as follows:

> "The motion to dismiss is urged first upon the ground that Charles L. Burrill as Treasurer and Receiver General was the defendant in the original bill and that the present defendant Jackson, his successor in office, has been substituted without legal sanction. The

substitution took place in the Supreme Judicial Court of Massachusetts before that court considered the case on its merits and in the court's opinion the objection to the substitution was noted and overruled. This settles conclusively so far as we are concerned, that the state law authorized the substitution." (p. 313.)

In the case of *McCaughey v. Lyall*, 224 U. S. 558 (1912), the heirs' contention was that as land passed to them on the death of the intestate they had to be made parties in an action of foreclosure against the administrator. The California Supreme Court held otherwise. The United States Supreme Court dismissed the argument summarily by stating:

"The Supreme Court of the State in a number of decisions has considered that section to mean that an heir is not a necessary party with the administrator. (The decisions are cited.) This is conceded by plaintiffs in error, but they say that because § 1582 of the Code of Civil Procedure 'is made the basis of the rule established by the Supreme Court of the State' they complain of it, and respectfully urge that it 'is repugnant to the Fourteenth Amendment of the Constitution of the United States, § 1.' This is equivalent to saying that the legislative power of the State, being the source of the rights and the remedies, has so dealt with one as to make the other repugnant to the Constitution of the United States; or, if the complaint be of the decisions, that the Supreme Court of the State cannot construe the laws of the State and make of them a consistent system of jurisprudence, accommodating rights and remedies. Both contentions are so clearly untenable that further discussion is unnecessary." (p. 563.)

The rule is expressed in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673 (1930), cited by petitioners, as follows:

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"It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the State; that this court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrine established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court." (p. 680.)

"Undoubtedly, the state court had the power to construe the statute dealing with the State Tax Commission; and to re-examine and overrule the Laclede case. Neither of these matters raises a federal question; neither is subject to our review." (p. 681.)

Cohen v. Beneficial Loan Corp., 337 U. S. 541 (1948). New Jersey by statute required a shareholder suing on behalf of a corporation to furnish security for attorneys fees unless holding a specified minimum number of shares. It was held that the statute does not deny due process or equal protection. "A state may set the terms on which it will permit litigations in its courts." (p. 552.)

When, as in the instant case, there are state grounds broad enough to sustain the denial of petitioners' motion for leave to intervene, this Court customarily does not take jurisdiction. *Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U. S. 300, 303-4 (1917); *Klinger v. Missouri*, 80 U. S. 257, 263 (1871); *Johnson v. Risk*, 137 U. S. 300, 307 (1890); *Lynch v. New York ex rel. Pierson*, 293 U. S. 52, 54 (1934); *White v. Ragen*, 324 U. S. 760, 766-7 (1945); *Woods v. Nierstheimer*, 328 U. S. 211, 216-7 (1946).

Denial of Leave to Intervene Was Not a Final Judgment.

Since the denial of leave to intervene was by the highest Court of Ohio on an adequate "state" ground, it is quite immaterial whether such order was a final judgment within the meaning of 28 U. S. C. Section 1257 (3).

However, since there were and are other forums and means for protection of all real rights of the petitioners, the rulings on their motion for leave to intervene were not "final" in an appealable sense.

The petitioners concede that "An order denying permissive intervention is final only if the applicant for intervention has no other adequate means of asserting his rights," (their brief, p. 27). They do not gain even the first round in a ladder leading to the conclusion that other courts and means were not available. Indeed, as aforesaid, they concede that their Lucas County cases were adequate. But they urge that denial of leave to intervene as of right is final and reviewable. However, they predicate their "right" upon a construction of an Ohio statute to which construction the Supreme Court of Ohio did not subscribe. Thus their absolute "right" evaporates and even if the Ohio Supreme Court erred according to the opinions of other lawyers and judges, no federal question would be presented. The writ in the mandamus case did not purport to dispose of the Lucas County cases or any property rights of the petitioners, or to cut off access to any court of original jurisdiction over the claims of the petitioners. What is or is not a "final judgment" for purposes of appeal within the same judicial hierarchy is, therefore, of little or no consequence when the existence of the right depends upon the construction of a state statute and the highest court of the state acts in denial of the existence of such right.

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In *Credits Commutation Co. v. U. S.*, 177 U. S. 311 (1900), certain lien creditors obtained appointment of receivers for the Union Pacific. Trustees of the first mortgage filed a complaint to foreclose the mortgage. The United States filed a complaint to foreclose its subsidy lien. Credits Commutation Company and another corporation applied in each of the three cases for leave to intervene in order "to assert certain alleged rights and interests." Leave was denied, appeal to the Circuit Court of Appeals was allowed, motion to dismiss that appeal was sustained and appeal to the Supreme Court allowed. This court held as is stated in the headnote:

> "When leave to intervene in an equity case is asked and refused, the order denying leave is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding.
>
> "The action of the court below, in denying the petitions to intervene, was an exercise of purely discretionary power, and was not final in its character."

These principles were followed in *Ex Parte Leaf Tobacco Board*, 222 U. S. 578 (1911); *Sutphen Estates, Inc. v. U. S.*, 342 U. S. 19 (1951); *Lupfer v. Carlton*, 64 F. 2d 272 (5 C. C. A., 1933), and *Mackey v. City of Little Rock*, 94 F. 2d 546 (8 C. C. A., 1938, c.d. 304 U. S. 582), a case in which a taxpayer sought and was denied leave to intervene in a case removed from state to federal court.

THE CAUSE HAS BECOME MOOT.

The Record, pages 2-3, shows that the Supreme Court of Ohio granted the Commission's prayer, allowed a writ of mandamus commanding its Secretary-Treasurer, respondent Allen, to seal, attest and deliver the Trust Agreement and the bonds and that the writ was served. An affi-

davit by Mr. Allen, filed with the Clerk and printed as an appendix to this brief,* brings to the Court's attention the fact that the mandate was executed on the twentieth day and after much publicity, there being no stay or restraining order. A failure by respondent Allen to comply would have placed him in contempt of Ohio's highest court. Pursuant to the writ and the Trust Agreement, an unusually large sum has been realized from a great number of bonds distributed to the public. This renders the cause moot. Reversal of the denial of leave to petitioners to intervene could not restore the Secretary-Treasurer to his former position in relation to financing for the project.

In *Codlin v. Kohlhausen,* 181 U. S. 151 (1901), a territorial court of New Mexico granted a writ of mandamus commanding officers of a Board of County Commissioners to sign and deliver for sale bonds to finance construction of a courthouse. This was done and so an appeal to this Court was dismissed on the ground that the cause had become moot under the rule applied in *Mills v. Green,* 159 U. S. 651, 653 (1895).

In *United States ex rel. Norwegian Nitrogen Products Company v. United States Tariff Commission,* 274 U. S. 106 (1927), two paragraphs of the headnote are:

> "4. In the absence of an injunction or restraining order, an administrative body, after judgment in its favor in an action to control its conduct by mandamus, may proceed to dispose of the matter before it notwithstanding the pendency of a writ of error to the judgment. P. 111.
>
> "5. A case becoming moot pending review should be remanded with directions to dismiss. P. 112."

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* This is acceptable practice according to page 503 of *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States,* as revised (1951) by Wolfson and Kurland.

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In *Brownlow v. Schwartz,* 261 U. S. 216 (1923), a mandamus proceeding was brought in the Supreme Court of the District of Columbia to compel the issuance of a building permit. The trial court denied the writ, but on appeal the Court of Appeals reversed and ordered issuance. An appeal was taken to the Supreme Court, but while it was pending a clerk believing that the Court of Appeals decision was binding, issued the permit, and the building was erected before the case was heard by the Supreme Court. The relator had also disposed of her interest prior to the hearing. The court said:

> "It thus appears that there is now no actual controversy between the parties—no issue on the merits which this Court can properly decide. The case has become moot for two reasons: (1) because the permit, the issuance of which constituted the sole relief sought by petitioner, has been issued and the building to which it related has been completed, and (2) because, the first reason aside, petitioner no longer has any interest in the building, and therefore has no basis for maintaining the action.
>
> "This Court will not proceed to a determination when its judgment would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. *A reversal would ostensibly avoid an event which had already passed beyond recall.* One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain. * * *." (pp. 217-8; emphasis added.)

Doremus v. Board of Education, supra, 342 U. S. 429 (1952), is a late case to the foregoing effect.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

HENRY J. CRAWFORD,
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Cleveland 14, Ohio,

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361 East Broad Street,
Columbus, Ohio,

Counsel for Respondent,
Ohio Turnpike Commission.

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APPENDIX.

Affidavit to Evidence that the Cause Has Become Moot.

STATE OF OHIO,
COUNTY OF FRANKLIN, SS:

Archibald J. Allen, one of the respondents in the above entitled cause, being first duly sworn according to law deposes as follows:

1. Affiant resides at Cincinnati, Ohio, and is Secretary-Treasurer of the Ohio Turnpike Commission, the other respondent.

2. As the record for the petition in the above entitled cause shows, the petition is for a writ of certiorari to the Supreme Court of Ohio for review of the decision and record of the Supreme Court of Ohio upon a petition for a writ of mandamus, filed in said court on June 4, 1952 as case numbered 33129 upon the docket of said court, wherein the Ohio Turnpike Commission as relator in the name of the State of Ohio sought a writ of mandamus to affiant. The proceedings in the Supreme Court of Ohio followed a resolution of said Ohio Turnpike Commission, a copy of which resolution was attached as Exhibit 1 to said petition for a writ of mandamus and was entitled:

> "A resolution determining the necessity of constructing Turnpike Project No. 1, authorizing the issuance of $326,000,000 of Turnpike Revenue Bonds, Project No. 1, of the State of Ohio and the execution and delivery of a trust agreement securing said bonds, and providing for the execution and delivery of temporary bonds." (Record in the captioned cause, page 20.)

The petition for said writ of mandamus alleged (R., pp. 19-20):

> "14. All necessary steps have been taken preliminary to the performance by Respondent of his

legally imposed duty to affix the seal of Relator to said bonds and attest the same and to deliver said bonds to the Trustee for authentication and delivery, and to affix the seal of Relator to said Trust Agreement and attest the same but Respondent has refused and still refuses to perform any of such mandatory duties.

"15. Said proposal of Blyth & Co., Inc. and others accepted by Relator as alleged in paragraph 10 hereof requires the delivery of all of said temporary bonds not later than September 4, 1952, upon giving a notice prior thereto as provided in the proposal, unless such time is extended, as therein provided, by the purchaser. The market for such bonds is now exceptionally favorable and if by reason of delay or otherwise Relator is unable to make delivery in accordance with the terms of such proposal Relator believes, and therefore avers, that the terms of any bonds subsequently issued will not be as favorable as those in said proposal.

"16. The cost of materials and labor necessary for the construction of the turnpike is advancing and, it appears, will continue to advance so that any material delay in the issuance of said bonds will add substantially to the cost of the turnpike." (R., pp. 19-20.)

3. As appears upon pages 2 and 3 in the record for the pending petition in the Supreme Court of the United States, the Supreme Court of Ohio on July 9, 1952 made entry in said proceedings that—

"* * * it is, therefore ordered and adjudged that the writ of mandamus prayed for be, and the same hereby is, allowed and said respondent is hereby commanded to affix the seal of Relator to the Trust Agreement, which is authorized by the resolution of Relator which is set forth in Exhibit 1 of the Petition herein, and to attest the same, to affix the seal of the Ohio Turnpike Commission to the temporary bonds, provided for in

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said resolution, and attest the same and to deliver them to the Trustee, under said Trust Agreement, and later to affix said seal to additional temporary bonds and definitive bonds provided for in said resolution, and attest the same and deliver them to said Trustee when ready to be issued." (R., p. 3.)

This writ was served upon and received by affiant on July 9, 1952. (R., p. 2.)

4. As the effectiveness of said writ of mandamus from the Supreme Court of Ohio was not by its terms, nor by any other order of said court or of any judge of the court, nor by any order of the Supreme Court of the United States nor of any justice of the court, stayed or delayed, and as there was no order of any court, including the Court of Common Pleas, Lucas County, Ohio, to which the petition and record filed with the Supreme Court of the United States refer (R., pp. 239-247), restraining or enjoining affiant from proceeding to comply with the mandate of the Supreme Court of Ohio, affiant did, on July 9, 1952, affix the seal of the Ohio Turnpike Commission to the Trust Agreement involved in the above entitled cause and did on that date attest the same. Thereafter, prior to July 29, 1952, and pursuant to said mandate of the Supreme Court of Ohio, affiant affixed the seal of said Commission to and attested the same on the original 326 temporary bonds in the aggregate principal amount of $326,000,000 which are referred to in the petition and record in the above entitled cause and caused said temporary bonds to be delivered to the Trustee under said Trust Agreement for issuance to the 408 members of the underwriting group (herein called the "Purchasers") who had agreed to purchase the same under the Agreement of Purchase hereinafter mentioned. Also prior to July 29, 1952 and pursuant to said mandate of the Supreme Court

of Ohio, affiant affixed the seal of said Commission to and attested the same on approximately 250,000 additional temporary bonds in the aggregate principal amount of $326,000,000 in coupon and registered form in order to have them available for exchange for the original temporary bonds and caused such additional temporary bonds to be delivered to the Trustee under said Trust Agreement for such purpose. On July 29, 1952, the Trustee delivered to the purchasers the aforesaid original temporary bonds which were deliverable to them under the Agreement of Purchase, and said additional temporary bonds were on the same day duly exchanged for said original temporary bonds and such additional temporary bonds in coupon and registered form were sold and delivered by said purchasers to the public and widely distributed as is usual in a public sale and distribution of such an extremely large issue of securities. All of said transactions were effected pursuant to the Agreement of Purchase entered into June 4, 1952 and appearing in the petition and record in the above entitled cause at pages 34 to 39.

5. The fact that affiant was proceeding to affix the seal of said Commission to said temporary bonds received full publicity in advance of the delivery thereof. The fact that said bonds would be delivered and publicly distributed on July 29, 1952 was made known to the members of the underwriting group by official notice from the managers of the group before July 24, 1952 and the intention to effect delivery on July 29, 1952 as aforesaid was published on July 24, 1952 in The Daily Bond Buyer, the principal financial journal in the United States relating to municipal and governmental issues, and at or prior to that time, other and further publicity with respect to the signing of said bonds appeared in the Toledo Times, a newspaper of general circulation in Lucas County, Ohio, where the pe-

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titioners reside, the Columbus Citizen and Columbus Dispatch, newspapers of general circulation in Franklin County, Ohio, wherein the state capital and principal office of the Commission are located, and in the Cleveland Plain Dealer and Cincinnati Enquirer which, respectively, are published in the two largest cities in Ohio.

6. The Trustee under the aforesaid Trust Agreement has received the entire proceeds of said bond issue, substantial expenditures have in the normal course of business been made therefrom pursuant to the terms of said Trust Agreement and said Commission has in the normal course of business entered into commitments to numerous persons for payments from said proceeds in connection with the construction of the Turnpike and to the best of the knowledge and belief of affiant, all of the bonds have been distributed by the purchasers thereof to holders who have paid valuable consideration therefor.

Further affiant saith not.

ARCHIBALD J. ALLEN.

SWORN To before me and subscribed in my presence at Columbus, Franklin County, Ohio, this 7th day of October, A. D. 1952.

FRANK C. DUNBAR, JR.,
Frank C. Dunbar, Jr., *Notary Public.*
(Notarial Seal)